IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity of ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
vs.	)	Case No. 05-CV-0329-JOE-SAJ
1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVAIGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PETERSON FARMS, INC.'S MOTION TO DISMISS AND, OR IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS PENDING APPROPRIATE REGULATORY AGENCY ACTION, AND BRIEF IN SUPPORT

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Defendant Peterson Farms, Inc. ("Peterson"), submits this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) for the Court's lack of subject matter jurisdiction over the claims made in this lawsuit and for the State of Oklahoma's, through its Attorney General

and Secretary of the Environment (hereinafter "Plaintiffs), failure to state a claim for which the Court can grant relief, respectively, in any of the Counts 1 through 10 in the First Amended Complaint (the "Complaint") for the reasons that:

(1) Plaintiffs' attempt to impose liability on Peterson for its operations and those of the independent contract growers conducted within Arkansas violates the sovereignty of the State of Arkansas and the Due Process and Commerce Clause protections set forth in the United States Constitution. Further, by virtue of being predicated on allegations of interstate water pollution, Plaintiffs' claims are preempted by federal law, namely the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Arkansas River Basin Compact, OKLA. STAT. tit. 82, § 142; ARK. CODE ANN. § 15-23-401;

(2) Plaintiffs cannot maintain their SWDA Citizen Suit because they have failed to comply with the applicable notice requirements prior to commencing the action and the State of Oklahoma is not a proper party to such an action;

(3) Plaintiffs cannot maintain a nuisance *per se* cause of action because the alleged tortious acts alleged in the Complaint have a beneficial purpose as a matter of law;

(4) Plaintiffs have failed to exhaust the administrative remedies required before the Court can exercise subject matter jurisdiction over the claims in this lawsuit; and

(5) Plaintiffs cannot maintain their common law claims because the Court lacks jurisdiction to consider these claims under the Political Question Doctrine.

In the alternative, or in addition to any relief granted pursuant to its Motion to Dismiss, Peterson moves the Court to stay the proceedings in this action, pending appropriate action by the Oklahoma Department of Agriculture, Food & Forestry ("ODAFF") and the other Oklahoma "environmental" administrative agencies, to whom the Oklahoma Legislature delegated jurisdiction over the subject matter underlying the claims asserted by Plaintiffs in this lawsuit.

I. INTRODUCTION

In their Complaint, Plaintiffs paint a curious paradox of the Illinois River Watershed ("IRW"), which is the subject of this action. On one hand, Plaintiffs describe the Illinois River as an outstanding water resource with significant fish, wildlife and aesthetic values, and further

characterize Tenkiller Ferry Lake as "the emerald jewel in Oklahoma's crown of lakes." Yet, on the other hand, Plaintiffs paint a contrived and dire image of the IRW as a 1,069,530-acre *hazardous waste site*, which they assert is contaminated by various substances, the bulk of which are nutrients – ubiquitous in nature and necessary for and a natural byproduct of nearly all living organisms. Plaintiffs remarkably assert that this "outstanding resource" and "crown jewel" now pose an "imminent and substantial endangerment to the health and environment" of the people and property within the watershed. (Complaint at ¶ 95).

The second view of the IRW is solely the creation of Oklahoma's Attorney General as the self-described possessor of "complete dominion" over litigation he elects to pursue in the name of the State of Oklahoma and its citizens, regardless of the litigation's lack of foundation in either law or fact. On this point, the fictional depiction of the IRW as a massive hazardous waste site gains no support from any of the many, responsible state and federal environmental regulatory agencies who, under color of law, closely monitor the conditions and activities within the IRW. Unlike the Attorney General, however, these regulatory agencies have not designated or otherwise labeled the IRW a hazardous waste disposal site; have not determined that animal manure is a "hazardous" or "solid waste"; and have not found that the operations of the Defendants or the independent poultry growers are threatening or harming the State of Oklahoma's natural resources.

The divergent viewpoints of the partisan Attorney General and the various regulatory agencies is of considerable legal significance, insofar as the conduct and alleged consequences set forth in Plaintiffs' Complaint are governed by a well-defined and comprehensive scheme of state and federal statutes and regulations enacted by the Oklahoma Legislature, the Arkansas Legislature, and the United States Congress, respectively. These allegations have been addressed by the

respective legislative bodies with those bodies delegating responsibilities for the subject matter of this lawsuit to the regulatory agencies to the exclusion of the Attorney General.

Nevertheless, for purposes of this lawsuit, Plaintiffs, through exercise of the Attorney General's purported "complete dominion," have chosen to wholly ignore the laws enacted by the respective legislative bodies, undermining each sovereigns' manifested public policy in favor of a single official's political will. In doing so, Plaintiffs effectively seek to render an entire body of state and federal law a nullity on which no party to this lawsuit, persons potentially affected by this lawsuit, nor the citizenry of Oklahoma and Arkansas can either rely or reasonably order their affairs. Moreover, as discussed below, Plaintiffs' claims in this lawsuit affront the fundamental protections of the United States Constitution and the supremacy of federal law by seeking to extend the reach of Oklahoma law across the border to regulate commerce and the citizens of a neighboring sovereign.

Based on the allegations in the Complaint, Plaintiffs cannot maintain their various common-law and Oklahoma statutory and regulatory claims against the Defendants for alleged pollution arising from the activities of both Oklahoma and Arkansas farmers within the borders of each state, regardless of whether Plaintiffs establish a requisite relationship between the Defendants and the independent farmers. Quite simply, notwithstanding the Oklahoma Attorney General's proclamation of "complete dominion over every litigation in which he properly appears" (Complaint at ¶ 5), this purported dominion does not permit the State of Oklahoma or its representatives to impose its laws, public policy, or political will on a neighboring sovereign and its citizens, such as Plaintiffs are attempting to do in this lawsuit. Moreover, certain of Plaintiffs' claims are preempted by federal law as contained in the Clean Water Act and the Arkansas River Basin Compact. In addition,

Plaintiffs cannot maintain their SWDA claim because they have failed to comply with the notice requirements contained in that statutory regime. Thus, Plaintiffs have failed to state claims for which this Court can grant relief, entitling Peterson to relief in accordance with Federal Rule of Civil Procedure 12(b)(6).

Furthermore, Plaintiffs cannot maintain their claims in this lawsuit because they have failed to exhaust the administrative remedies required under Oklahoma law as a prerequisite to the Court's exercise of subject matter jurisdiction over the their claims. As a matter of long-established law, all administrative remedies must be exhausted before a party may seek judicial relief, as Plaintiffs are doing in this matter. In this action, Plaintiffs have asserted claims that explicitly require administrative action; yet, they have not sought any relief through the responsible regulatory agencies. (*See*, *e.g.*, Complaint at Counts 4, 7, 8 and 9). Accordingly, without having first sought relief through the appropriate administrative bodies, Plaintiffs have denied this Court the subject matter jurisdiction to consider their claims in this lawsuit. Likewise, Plaintiffs' common-law claims are precluded by the Political Question Doctrine. Thus, these claims should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(1).

Finally, even if Plaintiffs were able to maintain their claims against Peterson for the actions of Oklahoma and Arkansas farmers undertaken within the borders of each state, ODAFF has primary jurisdiction over the subject matter of the claims alleged in the Complaint, *i.e.*, alleged nonpoint source discharges related to agriculture. Similarly, other Oklahoma administrative agencies have been delegated duties by the Oklahoma Legislature under the scheme imposed on the states under the Clean Water Act. These agencies have begun, and continue their efforts to improve the quality of Oklahoma waters, including those within the IRW. Plaintiffs' lawsuit, however, disrupts and

delays these efforts to the detriment of the public and the subject waters. The primary jurisdiction of these regulatory bodies compels the conclusion that this action be stayed until such time as these agencies satisfy their legislatively mandated responsibilities.

Accordingly, the claims brought by Plaintiffs should be dismissed under Federal Rules of Civil Procedure 12(b)(1) and (6), and/or this lawsuit should be stayed until such time as the appropriate administrative agencies have undertaken the factual findings and remedial actions delegated to them by the Oklahoma Legislature.

II. ARGUMENT AND AUTHORITY

A. COUNTS 4 THROUGH 10 OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE THEY INVADE ARKANSAS'S SOVEREIGNTY, VIOLATE THE UNITED STATES CONSTITUTION AND ARE PREEMPTED BY FEDERAL LAW.[1]

Because Plaintiffs' claims contained in Counts 4 through 10 of the Complaint are based on the alleged conduct of Peterson and the farmers with whom it contracts within and *outside* the borders of Oklahoma, Plaintiffs have failed to state a claim for which this Court can grant relief.[2] As discussed below, Plaintiffs cannot maintain these claims based on the conduct of Peterson, as a citizen of Arkansas, or the Arkansas farmers with whom it contracts, because (1) the statutory and regulatory claims, inclusive of Plaintiffs' common-law theories, are precluded by elementary

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[1] The Complaint contains the following ten counts: (1) cost recovery action under CERCLA; (2) natural resource damage claim under CERCLA; (3) SWDA citizen suit; (4) state law nuisance claim; (5) federal common law nuisance claim; (6) common law trespass claim; (7) alleged violation of OKLA. STAT. tit. 27A, § 2-6-105 and OKLA. STAT. tit. 2, § 2-18.1; (8) alleged violation of OKLA. STAT. tit. 2, § 10-9.7 and OAC § 35:17-5-5; (9) alleged violation of OAC § 35:17-3-14; and (10) unjust enrichment, disgorgement and restitution.

[2] In addition to the arguments set forth herein at length, Peterson adopts and joins in the arguments set forth in "Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint and Integrated Opening Brief in Support," regarding dismissal of Plaintiffs' Counts 4 through 10.

concepts of sovereignty and constitutional principles; and (2) Plaintiffs' Oklahoma and federal common-law claims are preempted by the Clean Water Act.

1. *Plaintiffs' common-law claims should be dismissed as precluded by Oklahoma's statutory and regulatory program governing the conduct at issue.*

As an initial matter, all of Plaintiffs' claims, whether pleaded as statutory or common-law claims, arise from the alleged presence of excess nutrients and other constituents in the waters of the IRW, which Plaintiffs attribute to the land application of poultry litter. However, the land application of poultry litter is legal in the State of Oklahoma; authorized by the Oklahoma Legislature and ODAFF; and, indeed, the practice is heavily regulated to ensure that the practice does not cause harm to the environment or the waters of the State. *See*, *e.g.*, OKLA. STAT. tit. 2, §§ 10.9–10.9-25 (comprising the Oklahoma Registered Poultry Feeding Operations Act, the Oklahoma Poultry Waste Transfer Act, the Oklahoma Poultry Waste Applicators Certification Act, and Educational Programs on Poultry Waste Management); OAC §§ 35:17-5-1–35:17-7-11 (comprising regulations for Registered Poultry Feeding Operations and Poultry Waste Applicators Certification).[3]

For example, the Oklahoma Registered Poultry Feeding Operations Act requires all owners or operators of poultry operations in Oklahoma to register with the State Board of Agriculture before constructing or operating a new facility and, thereafter, must register annually to continue operating. *See* OKLA. STAT. tit. 2, §§ 10-9.3, 10-9.4. Moreover, the Act prohibits the registered poultry operation from contaminating the waters of the State, and authorizes extensive regulation by ODAFF to accomplish this mandate. *See id.* § 10-9.7. Similarly, the poultry farmers' management

[3] Arkansas also regulates poultry operations and the land application of poultry litter. *See*, *e.g.*, ARK. CODE ANN. §§ 15-20-901–15-20-906 (Arkansas Poultry Registration Act); *id.* §§ 15-20-1101–15-20-1114 (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act).

of litter is closely controlled. The Oklahoma Poultry Waste Applicators Certification Act and the regulations authorized thereunder specify when, or if, poultry litter can be spread in a nutrient-sensitive watershed, such as the IRW. *See id.* §§ 10-9.19, 10-9.19a. Notably, the regulations promulgated by ODAFF under these statutory schemes state the purpose of the poultry-related statutes and regulations, to wit:

> These rules shall serve to control nonpoint source runoff and discharges from poultry waste application of poultry operations. The rules allow for the monitoring of poultry waste application to land or removal from these operations and assist in *ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma*. . . .

OAC § 35:17-5-1 (emphasis added).

Significantly, as a general proposition, activities sanctioned by the Oklahoma Legislature–such as those authorized by the aforementioned Acts–cannot amount to actionable, tortious conduct. *See, e.g., Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1274 n.4 (Okla. 1991) (noting that an activity undertaken under the express authority of a statute is a "legalized nuisance" which may not be enjoined), *overruled on other grounds; see* OKLA. STAT. tit. 50, § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"). This has long been the law of Oklahoma, as recognized by the Supreme Court of Oklahoma as early as 1915:

> It seems to be well settled that, where one has the sanction of the state for what he does, unless he commits a fault in the manner of doing it, he is completely justified . . . . This upon the principle that, when the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law.

E.I. du Ponte Nemours Powder Co. v. Dodson, 150 P. 1085, 1087 (Okla. 1915) (citations omitted).

The activities which Plaintiffs claim have resulted in the injuries alleged in the IRW are sanctioned by the Oklahoma and Arkansas Legislatures, thus sheltering these activities from State common-law tort liability, *unless* Plaintiffs provide specific proof that the independent farmers have not complied with applicable statutory provisions and related regulations. As such, potential liability under Plaintiffs' common-law claims must necessarily be measured by, and are dependent on, these statutory and regulatory provisions, effectively transforming Plaintiffs' common-law claims into claims under the various statutory and regulatory provisions relied upon by Plaintiffs.

2. *Counts 4, 6, 7, 8, 9, and 10 seek to regulate the conduct of Arkansas citizens within the borders of Arkansas, and therefore, they should be dismissed.*

a. Plaintiffs' claims violate the sovereignty of Arkansas.

Assuming, for purposes of this Motion only, that the statutory and regulatory provisions relied upon by Plaintiffs have been violated, Plaintiffs nevertheless cannot maintain these claims against Peterson, as a citizen of Arkansas, as these claims are predicated on the conduct of the independent Arkansas farmers with whom Peterson contracts to grow poultry within the separate, sovereign State of Arkansas.

As a matter of law, Plaintiffs simply cannot encroach upon the sovereignty of Arkansas by subjecting its citizens to the statutory and regulatory requirements of Oklahoma law. *Cf. Oliver v. Oklahoma Alcoholic Beverage Control Bd.*, 359 P.2d 183, 189 (Okla. 1961) (commenting that "[t]he police power is an attribute of sovereignty inherent in every sovereign state . . ."); *Smith v. State ex rel. Hepburn*, 113 P. 932, 937 (Okla. 1911) (noting a state can "[n]either surrender [n]or stipulate away any of its sovereignty or render herself less sovereign than other states"); *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.*, 131 P. 43, 61 (Wyo. 1913) ("It is one of the plainest elementary rules that no Legislature can extend its laws to territory beyond the borders

of its own state"). Furthermore, "it is fundamental that the sovereignty of any government is limited to persons and property *within the territory it controls*." *Id.* at 59; *see id.* at 61 ("It is a familiar elementary principle that the laws of a state have no extraterritorial effect"). As such, the above-referenced claims should be dismissed insofar as Plaintiffs' efforts in this lawsuit to govern Arkansas citizens invade the sovereignty of Arkansas.

b. Plaintiffs' claims violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Any attempt by Plaintiffs to subject Arkansas citizens to Oklahoma law also violates well-established principles of due process set forth in the Fourteenth Amendment to the United States Constitution. These due process safeguards apply both to individuals and corporations. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 285 (1989). By filing the instant lawsuit, Plaintiffs are attempting to extraterritorially impose Oklahoma laws, rules, and regulations on law-abiding citizens of Arkansas, including Peterson and the independent Arkansas farmers with whom it contracts. Specifically, Plaintiffs' Counts 4 and 6 through 10 seek to bring these Arkansas entities within the reach and jurisdiction of Oklahoma law.

The Due Process Clause of Fourteenth Amendment dictates that Plaintiffs lack both the power and authority to exercise extraterritorial jurisdiction over another state by imposing regulations that control activities wholly beyond the boundaries of Oklahoma. *See Watson v. Employer Liab. Assur. Co.*, 348 U.S. 66 (1954).

> It is fundamental that jurisdiction of all governments is geographical or territorial. Any attempt at extra-territorial jurisdiction constitutes an invasion of another sovereignty. . . . The jurisdiction of a state, acting either through its executive, legislative, or judicial department, or by a combined action of one or more of such departments must confine itself to persons and property and activities within it

> boundaries, and *any attempt to control persons or things beyond such boundaries is ineffective and void for want of power and violates the due process clause of the XIVth Amendment to the Constitution of the United States*. [The Constitution] did not extend the power of the states. On the contrary, it restricted their power.

Minnesota v. Karp, 84 N.E.2d 76, 79 (Ohio App. 1948) (emphasis added); *see Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (concluding that an attempt by the State of Mississippi to alter terms of an insurance contract made in Tennessee was a due process violation); *New York , Lake Erie & W. R.R. Co. v. Pennsylvania*, 153 U.S. 628 (1894) (concluding that an attempt by Pennsylvania to regulate conduct of a New York railroad was a violation of the company's due process even though the company conducted operations in Pennsylvania). Again, Plaintiffs' claims in Counts 4, 6, 7, 8, 9, and 10 should be dismissed since these claims offend the Due Process Clause of the Fourteenth Amendment.

c. Plaintiffs' claims violate the Commerce Clause of the United States Constitution.

In addition to encroaching upon a sovereign neighbor and violating Arkansans' due process rights, Plaintiffs will likewise be in violation of the Commerce Clause of the United States Constitution if they are allowed to subject the commercial activities of Arkansas citizens to Oklahoma statutory and regulatory requirements, insofar as such conduct would run afoul of dormant Commerce Clause jurisprudence.[4] In this regard, "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce

[4] Of note, the federal environmental statutes were enacted under Congress's Commerce Clause powers. *See United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003) (noting that the Clean Water Act was enacted under power to regulate interstate commerce); *Burnette v. Carothers*, 192 F.3d 52, 59 (2d Cir. 1999) (commenting that CERCLA was enacted pursuant to Commerce Clause authority).

Clause." *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989). Moreover, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. Significantly, where a state seeks to project its legislation into another state, the former state's action is, in effect, a direct regulation of commerce in the latter state. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583-84 (1986).

Thus, while a state may enact standards within its borders stricter than those required by the federal environmental legislation, *see International Paper Co. v. Oullette*, 479 U.S. 481, 490 (1987), a state may not seek to impose its standards on another sovereign state, whether directly or indirectly, without violating the Commerce Clause. *See Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (prohibiting state regulation of interstate commerce by "any attempt 'directly' to assert extraterritorial jurisdiction over person or property"); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999) (prohibiting indirect regulation of interstate commerce); *Childs v. State ex rel. Okla. State Univ.*, 848 P.2d 571, 577 (Okla. 1993) ("Another critical inquiry under the Commerce Clause is whether the practical effect of the state law is to control conduct beyond the boundaries of Oklahoma").

In the instant action, Plaintiffs seek to impose liability on Peterson for "acts or omissions within and outside of Oklahoma that have injured the IRW." (Complaint at ¶ 4). Plaintiffs' theory of liability against Peterson for these alleged acts and omissions outside the borders of Oklahoma is based in significant part upon the alleged violation of various Oklahoma statutory and regulatory provisions and several common-law claims, which as discussed above, have no efficacy in the

absence of a violation of the aforementioned codifications, since the Oklahoma Legislature (and, indeed, Arkansas Legislature) has sanctioned the alleged acts and omissions at the center of Plaintiffs' claims. Plaintiffs are simply without the power and authority to extend Oklahoma law across the border in order to regulate Peterson's conduct or that of the independent contract growers occurring in Arkansas. Yet, this is precisely what Plaintiffs propose to do on the face of their Complaint.

If Plaintiffs are permitted to project these Oklahoma codifications and common-law principles across the border into Arkansas in order to regulate the poultry industry in that state, the action amounts to a direct regulation of commerce in Arkansas. Any action of this nature is a *per se* violation of the Constitution' s Commerce Clause and, thus, cannot be allowed. Plaintiffs are limited, among other things, by the Constitution to governance within the borders of Oklahoma. As such, based on the State of Oklahoma's limited sovereignty and the further limits imposed by the Commerce Clause, Plaintiffs cannot maintain these aforementioned claims against Peterson, or the independent contract farmers in Arkansas, for their Arkansas operations. For purposes of the instant motion, Plaintiffs cannot possibly prove any set of facts on which Peterson can be found liable under the Oklahoma statutory claims asserted in the Complaint, inclusive of the common law theories, for the acts of Arkansas farmers conducted within the borders of Arkansas. Thus, Counts 4, 6, 7, 8, 9, and 10 should be dismissed for failure to state a claim on which this Court can grant relief.

3. *Counts 4, 5, 6, and 10 are preempted by the Clean Water Act.*

Plaintiffs likewise cannot maintain their common-law claims for alleged acts and omissions occurring within Arkansas, whether based in Oklahoma or federal common-law, against Peterson for the additional reason that those claims are preempted by federal law. *See Arkansas v. Oklahoma*,

503 U.S. 91, 99-101 (1992); *International Paper Co. v. Oullette*, 479 U.S. 481, 485-87 (1987); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 312-17 (1981). "[T]he regulation of interstate water pollution is a matter of federal, not state, law." *International Paper*, 479 U.S. at 488 (dicta). Moreover, the United States Supreme Court has held that, with regard to interstate water pollution, federal common-law and the common-law of an affected state are both preempted by federal statutory law, namely the Clean Water Act. *International Paper Co.*, 479 U.S. at 487; *see also Arkansas*, 503 U.S. at 99-100 (1992).

In *International Paper*, the United States Supreme Court reaffirmed its holding in *City of Milwaukee* that, in cases involving alleged interstate water pollution, federal common-law of nuisance is preempted by the CWA. *See International Paper*, 479 U.S. at 489; *see also City of Milwaukee*, 451 U.S. at 332. The *International Paper* Court also examined the relationship between state common-law and the CWA, concluding that, where alleged interstate pollution is concerned, the common-law of an affected state is likewise preempted. *See International Paper*, 479 U.S. at 493-94 (holding "that the CWA precludes a court from applying the law of an affected State against an out-of-state source"). The Court noted that permitting the affected state to bring an action under its common-law would "disrupt the balance of interests" sought through enactment of the CWA and further create a menagerie of "vague" and "indeterminate" standards. *Id.* at 495-96. The Court commented, as such, regarding the uncertainty and irrational regulations that would follow were an affected state's common-law allowed efficacy:

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually

> impossible to predict the standard for a lawful discharge into an interstate body of water."

Id. at 496-97 (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)). On this point, it is entirely conceivable that there are poultry farmers in Arkansas who own and land apply poultry litter on lands in adjacent watersheds, for example, one that drains into Oklahoma, and another that drains into Texas. If the states of Oklahoma and Texas were permitted to prosecute the instant type of claims against those farmers, the farmers would have to anticipate these actions in operating their farms so as to comply with Arkansas, Oklahoma and Texas laws – an impossible task. Thus, logic supports the legal precedent by holding that an affected state cannot seek to extend its common-law to an alleged source of pollution beyond its borders. *See id.* at 500.

Similarly, in *Arkansas v. Oklahoma*, the Supreme Court was faced with an issue somewhat similar to the one in this lawsuit. In that case, Oklahoma, the affected state, effectively sought to impose its water quality standards on Arkansas, the source state. *Arkansas*, 503 U.S. at 95-98. The *Arkansas* Court noted that the affected state had a subordinate position under the CWA regime. *Id.* at 100. It further noted that the affected state could, under its own laws, govern conduct within its borders. *See id.* at 99-100. However, the affected state cannot extend its common-law to the source state. *Id.* at 100. Like the *International Paper* Court, the *Arkansas* Court concluded that the affected state's subordinate position limited its potential common-law claims against another state to the tort law of the source state. *Id.*

In this action, Plaintiffs impermissibly seek to impose liability on Peterson under Oklahoma common-law and the federal common-law of nuisance for alleged pollution originating within the borders of Arkansas. In the Complaint, Plaintiffs go to great lengths to paint the State of Oklahoma as the victim of alleged pollution originating in Arkansas from the operations of Peterson and the

independent farmers with whom it contracts. Taken as true for purposes of this Motion, Plaintiffs effectively concede that, under the applicable precedent, Oklahoma is the affected state and that Peterson is a purported Arkansas source of its alleged injury. The *International Paper* and *Arkansas* opinions clearly denote that the CWA preempted the federal common-law of nuisance and any common-law claim based on the law of an affected state. Accordingly, because Plaintiffs' claims in this lawsuit are based on alleged interstate water pollution, Counts 4, 5, 6, and 10, all of which are based on Oklahoma and federal common-law, should be dismissed in accordance with Rule 12(b)(6) for failure to state a claim for which this Court can grant relief.

B. ALL OF PLAINTIFFS' CLAIMS ARE PREEMPTED BY THE ARKANSAS RIVER BASIN COMPACT.

Plaintiffs' claims are preempted by the Arkansas River Basin Compact ("ARBC") and constitute a breach of the compact on the part of the State of Oklahoma. Oklahoma and Arkansas have entered into the ARBC, *see* OKLA. STAT. tit. 82, § 1421 and ARK. CODE ANN. § 15-23-401, with the consent and approval of the United States Congress. The ARBC, by its plain terms, governs the dispute now before the Court, precluding Plaintiffs from maintaining any claim based on conduct occurring in Arkansas, regardless of whether the claims are made pursuant to Oklahoma, Arkansas or other federal law.

Congressional approval of the ARBC transformed the compact between Oklahoma and Arkansas into the law of the United States. *See Texas v. New Mexico I*, 462 U.S. 554, 564 (1983); *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 207 F.3d 1021, 1023 (8th Cir. 2000) ("When approved by Congress, a compact becomes a statute of the United States and must be construed and applied according to its terms"). "[B]y vesting in Congress the power to grant or withhold consent, the Framers sought to ensure that Congress would maintain ultimate supervisory

power over cooperative State action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981). As federal law, the ARBC has the same preemptive effect over inconsistent state law that any other federal law, such as the CWA, CERCLA and SWDA, would have over an inconsistent state law. *See Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg. Planning Agency*, 24 F. Supp. 2d 1062, 1069 (E.D. Cal. 1998); *accord Nebraska*, 207 F.3d at 1023 ("When the statutory language provides a clear answer, the analysis ends").[5]

The ARBC is also a binding contract between the States of Arkansas and Oklahoma. *See Texas v. New Mexico II,* 482 U.S. 124 (1987). The expansive scope and effect of a compact, such as the ARBC, has been characterized as follows:

> Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a *compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties.*

C.T. Hellmuth & Assoc. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976) (emphasis added). Indeed, as implied by the *C.T. Hellmuth* court, where the language of a compact conflicts with other federal law, the compact controls because it is more specific and limited in geographic scope. *See Texas v. New Mexico I*, 462 U.S. 554, 564 (1983) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its expressed terms"); *Lake Tahoe*, 24 F. Supp.2d at 1073. An interstate compact,

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[5] Like the CWA, control of interstate water pollution is one of the driving forces underlying the extensive use of interstate compacts. *See State ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951). Indeed, the *Dyer* Court commented that interstate compacts are the preferred way of handling "the delicacy of interstate relationships" as opposed to the "awkward and unsatisfactory . . . litigious solution" available to the states to resolve localized interstate issues. *Id.*

such as the ARBC, necessitates this result, because, since the agreements are freely negotiated between the states, they serve as the final statement on issues falling within the purpose and scope of the compact. *See* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL'Y REV. 163, 181 (2005).

By virtue of the ARBC, the States of Oklahoma and Arkansas surrendered a portion of their sovereignty over the IRW to the ARBC itself and to the ARBC Commission created to enforce it. Article XIII(A) of the ARBC makes cooperative and coordinated effort to abate interstate pollution "binding and obligatory" upon both Arkansas and Oklahoma. As such, interstate pollution within the IRW falls under the jurisdiction of the ARBC, *see* OKLA. STAT. tit. 82, § 1421, art. II(E) and art. IV(B), and relief must be consistent with its terms. *See Texaco v. New Mexico I,* 462 U.S. 554, 564 (1983).

The ARBC is more than an advisory compact and the ARBC Commission holds more than just advisory powers. The ARBC clearly contains measures for enforcement.[6] Under the terms of the Compact, the ARBC Commission has the authority to issue appropriate pollution abatement orders necessary for the proper administration of the Compact. *See* OKLA. STAT. tit. 82, § 1421, art. IX. These orders are enforceable by any court of competent jurisdiction and subject to appellate review, just as any other court order would be. *See id.* The ARBC also contemplates that the ARBC

[6] In the early stages of negotiation and drafting the ARBC, Arkansas-Oklahoma Arkansas River Compact Committee members specifically addressed the issue of whether the commission should be given only advisory powers or enforcement power. As indicated by subsequent drafts of the Compact itself, the members voted to give the ARBC Commission enforcement powers. *See* Minutes of the Fourth Meeting of the Arkansas-Oklahoma Arkansas River Compact Committee, at 4-5 (Dec. 13, 1956) (attached hereto as Exhibit "1").

Commission could issue injunctive orders as part of its enforcement arsenal. *See* Arkansas River Compact (Working Draft), art. X(A)(7) (April 14, 1969) (attached hereto as Exhibit "2").

As agreed between Oklahoma and Arkansas, and approved by Congress, a major purpose of the ARBC is, *inter alia*, "[t]o encourage the maintenance of an active pollution abatement program in each of the two states and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin." OKLA. STAT. tit. 82, § 1421, art. I(D). Regarding the pollution abatement programs contained in the ARBC, Oklahoma and Arkansas agreed to the following:

> A. The *principle of individual state effort to abate man-made pollution within each state's respective borders*, and the continuing support of both states in an active pollution abatement program;
>
> B. The *cooperation of the appropriate state agencies in the States of Arkansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas River Basin*; [and]
>
> C. Enter into joint programs for the identification and control of sources of pollution of the waters of the Arkansas River and its tributaries which are of interstate significance. . . .

Id. § 1421, art. VII (emphasis added).

Therefore, since the subject matter of this lawsuit falls within the scope of the ARBC, Plaintiffs cannot maintain their claims against Peterson because those claims are directed to alleged polluting sources outside of Oklahoma's "respective border." *Id.* Under the ARBC, the State of Oklahoma is free to pursue abatement of pollution within its borders to the extent permitted under Oklahoma law. However, this authority does not permit the State, or any of its representatives, including Plaintiffs, to attempt to govern or abate alleged pollution within the borders of Arkansas, regardless of the source of law, without violating the terms of the ARBC. Rather, in the event of

alleged interstate pollution, Oklahoma and Arkansas have agreed, and are otherwise required by force of federal law, to undertake cooperative efforts to resolve the pollution through legislation and employment of their respective state agencies' expertise and enforcement authority.

Moreover, because the ARBC has the effect of federal law, and Plaintiffs' claims based on other federal law and Oklahoma common-law, as well as those based on Oklahoma statutory and regulatory provisions, conflict with the plain language of the ARBC, Plaintiffs cannot maintain any of these claims against Peterson as they rely upon the alleged conduct of Peterson or independent Arkansas farmers within the borders of that state. The same is true regarding any claim that Plaintiffs may bring or otherwise assert under Arkansas law, since it too is preempted by the ARBC. Any unilateral attempt by Plaintiffs to circumvent the ARBC by filing a lawsuit addressing alleged pollution in the Arkansas portion of the IRW is in breach of the Compact. "Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves." COUNCIL OF STATE GOVERNMENTS, 1998 INTERSTATE COMPACTS AND AGENCIES REPORT 7 (1999) (attached hereto as Exhibit "3"); *see Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n,* 207 F.3d 1021, 1026 (8th Cir.2000).

Clearly, in this regard, Plaintiffs' attempt to regulate Arkansas conduct through litigation, even if based on Arkansas law, goes beyond the language of Article VII(A) of the ARBC, and it cannot be said under any circumstances that the instant litigation is a cooperative effort to abate alleged interstate pollution. In short, Plaintiffs' claims in this lawsuit conflict with federal law as contained in the ARBC, regardless if those claims are based on Oklahoma, Arkansas or other federal law, and constitute a breach of the ARBC itself. As such, the language of the ARBC compels the

conclusion that Plaintiffs' claims should be dismissed for failure to state a claim on which this Court can grant relief.

C. COUNT 3 SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF SWDA BEFORE COMMENCING THEIR CITIZEN SUIT.

Plaintiffs' SWDA Citizen Suit, brought pursuant to 42 U.S.C. § 6901 *et seq.*, should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have failed to comply with the applicable notice requirements prior to commencing their action against Peterson and the other Defendants, and because the State of Oklahoma is not a proper party to bring a citizen suit under 42 U.S.C. § 6972(a)(1)(B). In support of this contention, Peterson hereby adopts and incorporates by reference the arguments and authorities contained in "Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint and Integrated Opening Brief in Support," filed contemporaneously herein with the Court by counsel for said Defendant.

D. COUNT 7 SHOULD BE DISMISSED AS THE LAND APPLICATION OF POULTRY LITTER CANNOT CONSTITUTE A NUISANCE *PER SE.*

In the Complaint, Plaintiffs have alleged that violation of Oklahoma Statutes, Title 27A Sections 2-6-105 and 2-18.1 amounts to a public nuisance *per se.* (Complaint at ¶¶ 103-104). Plaintiffs cannot maintain this claim against Peterson for any of its or the contract growers' operations, whether in Arkansas or Oklahoma.

Under Oklahoma law, a nuisance *per se* is an activity which under all circumstances amounts to a nuisance. *See Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1276 n.6 (Okla. 1991) (defining a nuisance *per se* as "an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings"). The land application of poultry litter does not fit within this definition. In fact, use of poultry litter as fertilizer is recognized as a

beneficial use of the substance, *see* OAC § 35:17-5-1.[6] The recognition by the Oklahoma Legislature and ODAFF of the benefits derived from the land application of poultry litter clearly precludes this conduct from being a nuisance *per se.* As such, Peterson cannot possibly be found liable under nuisance *per se* claim based on the acts and omissions arising from its operations in Oklahoma, Arkansas or those of the independent farmers with whom it contracts. Thus, Peterson is entitled to dismissal of Plaintiffs' nuisance *per se* claims since they cannot possibly establish that land application or use of poultry litter is nuisance under *all* circumstances, regardless of surroundings.

E. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR THEIR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, PRECLUDING THE COURT FROM HAVING SUBJECT MATTER JURISDICTION OF THIS ACTION.

In addition to those reasons previously discussed, all claims in the instant action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for Plaintiffs' failure to exhaust administrative remedies required by Oklahoma law, thereby precluding the Court from exercising subject matter jurisdiction over this lawsuit. For purposes of brevity on this issue, Peterson fully adopts and incorporates herein the exhaustion of remedies argument and analysis on this proposition set forth at length in "Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action and Integrated Opening Brief in Support," filed herein by counsel for said Defendant.

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[6] *See also* OKLA. STAT. tit. 50, § 1.1 (providing for the nuisance exemption for agricultural activities); and ARK. STAT. ANN. § 2-4-101 (limiting the circumstances under which agricultural operations may be deemed a nuisance).

F. COUNT 4, 5, 6 AND 10 SHOULD BE DISMISSED UNDER THE POLITICAL QUESTION DOCTRINE.

In addition to the other reasons stated above, Plaintiffs' claims contained in Counts 4, 5, 6 and 10 of the Complaint should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(6) because said claims violate the Political Question Doctrine. In support of this position, Peterson hereby adopts and incorporates by reference the arguments and authorities set forth at length in "Tyson Chicken, Inc.'s Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint Under the Political Question Doctrine and Integrated Opening Brief in Support," filed contemporaneously herein with the Court by counsel for said Defendant.

G. THIS ACTION SHOULD BE STAYED PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION.[7]

In the alternative to the other relief requested herein, or in addition to any partial relief granted it by the Court, Peterson requests the Court to stay this action based on the doctrine of primary jurisdiction so that the various agencies tasked with addressing the alleged acts and omissions in Plaintiffs' Complaint may undertake the determinations delegated to them by the Oklahoma Legislature and/or the United States Congress as discussed below.

1. *This case satisfies the standards for applying the primary jurisdiction doctrine.*

As noted above, Plaintiffs have ignored the authority delegated by the Oklahoma Legislature to the various Oklahoma environmental agencies. In doing so, Plaintiffs have proposed a scenario in their Complaint where a party in full compliance with the applicable state and federal

[7] In addition to the positions briefed herein, Peterson joins the primary jurisdiction arguments contained in the "Cobb-Vantress, Inc.'s Motion to Dismiss or, Alternatively to Stay, State Law Claims and Integrated Brief in Support," to the extent that those arguments support Peterson's contention that ODAFF and the other Oklahoma environmental agencies have primary jurisdiction over the subject matter of this lawsuit.

environmental laws can, nevertheless, potentially be found liable under on their claims in complete derogation of the public policy embodied in the Legislature's enactments, thereby rendering them unconstitutionally vague. *See American Communications Ass'n v. United Steel Workers of Am.*, 339 U.S. 382, 412 (1950). However, this incongruous and, indeed, impermissible circumstance is avoided if the agencies responsible for implementing and enforcing these laws are permitted to perform the duties delegated to them by the respective legislative bodies.

As previously stated, several of the claims in this action are based upon alleged violations of Oklahoma statutory and regulatory provisions. For operations within Oklahoma, the codifications at issue delegate certain duties to various Oklahoma administrative agencies or bodies within those agencies, namely ODAFF and, in part, through the State Board of Agriculture. *See*, *e.g.*, OKLA. STAT. tit. 2, §§ 2-18.1, 10-9.7.[8] Moreover, the regulations at issue in this lawsuit were promulgated by ODAFF under the authority of the Oklahoma Legislature. *See id.* § 10-9.7. In addition, Congress has commanded the various states through various provisions of the Clean Water Act to formulate and implement water quality standards and to further develop comprehensive plans for nonconforming waters to meet those standards. Oklahoma has delegated these responsibilities to its several environmental agencies. In any event, in accordance with the doctrine of primary jurisdiction, this lawsuit should be stayed pending resolution of the issues delegated to ODAFF and these other environmental agencies as discussed hereafter.

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[8] Of note, the State Board of Agriculture is an entity within ODAFF, *see* OKLA. STAT. tit. 2, § 1-2, and is also an entity mandated by the Oklahoma Constitution. *See* OKLA. CONST. art. VI, § 31 ("Said Board shall be maintained as part of the State government, and shall have jurisdiction over all matters affecting animal industry . . . regulation . . ."). For the convenience of the Court, both entities will be referred to hereinafter simply as ODAFF.

"The doctrine of primary jurisdiction provides that where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376-77 (10th Cir. 1989). The doctrine holds that, before a judicial body may examine the merits of an action, "the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of the administrative body." *Id*. at 1376. As such, when the doctrine of primary jurisdiction applies to a particular controversy, the judicial proceeding is suspended until the administrative body has considered the factual issues. *Id.* at 1377. In determining whether the doctrine applies in a given case, there are three primary considerations: "[1] whether the issues of fact raised in the case are not within the conventional experience of judges; or [2] *whether the issues of fact require the exercise of administrative discretion*, or [3] *require uniformity and consistency in the regulation of the business entrusted to a particular agency*." *Id*. at 1377 (emphasis added).

Notably, the *Marshall* court also identified two additional considerations that fall under these primary considerations: (1) "Exercise of primary jurisdiction may be based on preventing the disruption of state efforts to establish a *coherent policy* with respect to a matter of substantial public concern . . . ," *id.* at 1379 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)); and (2) exercise of the doctrine is generally limited to a dispute that involves public rights. *See id*. The United States District Court for the District of Wyoming has identified yet other factors that should be examined in determining whether the doctrine is applicable: "[1] *whether the Defendants could be subjected to conflicting orders of both the Court and the administrative agency*; [2] whether relevant agency proceedings have actually been initiated; . . . and [3] *whether the Court can fashion the type of relief*

requested by the plaintiff." *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1169 (D. Wyo. 1998) (citing *Friends of Sante Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349-50 (D. N.M. 1995)) (emphasis added).

While, generally, determinations with regard to alleged pollution are within the conventional knowledge of a judge and jury, *see Marshall*, 874 F.2d at 1378, the determinations to be made in this lawsuit with regard to the operations within Oklahoma should nevertheless be made by ODAFF, because it has been charged by the Oklahoma Legislature with the exercise of administrative discretion and uniformity in regulation over the poultry industry in environmental matters. *See id.* at 1377. In this regard, Oklahoma law requires that, once the Legislature has delegated a responsibility to an administrative body, such as it has in the statutes at issue in this action, it cannot be further delegated:

> "It is a general principle of law, expressed in the maxim '*delegatus non potest delegare*',[9] that a delegated power may not be further delegated by the person to whom such power is delegated and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another. . . ."

Anderson v. Grand River Dam Auth., 446 P.2d 814, 818 (Okla. 1968) (quoting 2 AM. JUR. *Administrative Law* § 222). Furthermore, consistent with the factors outlined in *Marshall*, the Oklahoma Supreme Court noted in *Anderson* that, where the powers at issue are discretionary powers of the administrative body, such powers cannot be properly delegated to another. *See id.* (noting that the administrative body "cannot delegate powers and functions which are discretionary

[9] *Black's Law Dictionary* defines the phrase "*delegates non potest delegare*" as follows: "A delegate cannot delegate; an agent cannot delegate his functions to a subagent without the knowledge or consent of the principal; the person to whom an office or duty is delegated cannot lawfully devolve the duty on another, unless he expressly authorized so to do." BLACK'S LAW DICTIONARY 426 (6th ed. 1990).

or quasi-judicial in character"); *see also* Atty. Gen. Op., 2001 OK AG 15, ¶ 6 (same). Hence, it is unlawful for the Oklahoma Attorney General or the Secretary of Environment to self-delegate the authority granted to the State of Oklahoma's regulatory agencies to themselves.

Like the instant case, the *Anderson* case was before the court on a demurrer, the state procedural equivalent of a Rule 12(b)(6) Motion to Dismiss. *See Anderson*, 446 P.2d at 816-17. The *Anderson* case addressed the improper re-delegation of authority granted by the Oklahoma Legislature to the Grand River Dam Authority ("GRDA"). *See id.* at 817. Under the statutes promulgated by the Legislature, *see* OKLA. STAT. tit. 82, § 875, the GRDA was authorized to make discretionary determinations as to whether certain recreational use of lands and lakes under its jurisdiction were dangerous or otherwise interfered with the GRDA's business. *Anderson*, 446 P.2d at 817. The statute also authorized the GRDA to promulgate regulations in furtherance of the duty delegated to it by the Legislature. *See id.* In accordance with this grant of rule-making authority, the GRDA promulgated a regulation which required private landowners' written consent before issuing permits for anchorage of certain houseboats. *Id.* at 816.

This GRDA regulation, it was argued, delegated the GRDA's discretionary authority to private landowners. In effect, the GRDA left it to the private landowner to exercise discretion in evaluating the use of lands and lakes under the GRDA's jurisdiction, to wit:

> Assuming that this proviso [being the Oklahoma Legislature's grant of rule-making authority in the 1961 version of OKLA. STAT. tit. 82, § 862(p) in effect at the time] be construed as giving GRDA an unconditional discretion prescribing the location of the houseboat anchorage, such discretion must be exercised by GRDA, and not redelegated by it to the abutting landowner. A rule requiring an 'abutting landowner' to give its written consent before the anchorage location could be maintained under the circumstances here presented would be a substitution of the abutting landowner's judgment for GRDA.

Id. at 817-18. This re-delegation of the GRDA's authority allowed the private landowner to make the discretionary land and lake use determinations delegated to the GRDA by the Legislature. The Oklahoma Supreme Court held that such a re-delegation of authority was illegal and void. *See id.* at 819. Similarly, if the instant action is not stayed until such time as ODAFF makes the determinations required of it under the discretionary authority granted by the Oklahoma Legislature, this authority will effectively be re-delegated to entities not designated by the Legislature, such as the Attorney General of Oklahoma, this Court, or a jury.

2. *ODAFF has primary jurisdiction over Plaintiffs' claims.*

In the instant case, ODAFF has primary jurisdiction and discretionary authority over the claims and issues now before the Court that derive from conduct within Oklahoma. Foremost, ODAFF has been given broad, discretionary authority over all matters "affecting agriculture," including environmental matters. *See* OKLA. STAT. tit. 2, § 2-4. In fact, the Oklahoma Legislature has designated ODAFF as an "official environmental regulatory agency for agricultural point source and nonpoint source pollution within its jurisdiction." OKLA. STAT. tit. 2, § 2-18.2. As the Oklahoma Attorney General has determined,

> The State Board of Agriculture has jurisdiction over all aspects of the management and disposal of waste from animal industry including the environmental and aesthetic impacts of such waste on the air, land, or waters of the State.

1997 OK AG 95, ¶ 16.

Under this grant of authority, ODAFF has jurisdiction over agriculturally related nonpoint source discharges to the exclusion of other state environmental agencies. *See* OKLA. STAT. tit. 27A, § 1-3-101(D)(1); *compare* OKLA. STAT. tit. 2, § 8-41.16, *with* OKLA. STAT. tit. 17, § 52 (granting ODAFF jurisdiction over agricultural nonpoint sources to the exclusion of the Oklahoma

Department of Environmental Quality); *see also* OAC § 35:45-1-5(a) ("ODAFF has environmental responsibility for . . . point source discharges and nonpoint source runoff from . . . animal waste"). In addition, the Legislature has also delegated to ODAFF the authority to determine whether pollution has resulted from an alleged violation of the Oklahoma Agricultural Code. *See* OKLA. STAT. tit. 2, § 2-18.1(B).

In addition to these delegated powers, ODAFF is authorized by the Legislature to promulgate rules and regulations governing the management, use, and application of poultry litter. *See id.* §§ 2-4, 10-9.7(A)-(B).[10] The regulations that Plaintiffs allege that Peterson has violated are among those promulgated by ODAFF. *See* OAC §§ 35:17-3-14, 35:17-5-5. Indeed, Sections 35:17-3-14 and 35:17-5-5 of ODAFF regulations govern how, when, and where poultry litter will be handled. *See id.* As noted above, the purpose of ODAFF's rules and regulations governing poultry litter is to "control nonpoint source runoff and discharges from poultry waste application," while "ensuring beneficial use of poultry waste." *Id.* § 35:17-5-1.

Undoubtedly, the Oklahoma Legislature delegated this rule-making authority to ODAFF to ensure uniform and consistent regulation of the poultry industry. Under ODAFF regulations, the agency is responsible for licensing and/or registering all poultry operations. *Id.* § 35:45-1-7(a)(1). Likewise, ODAFF is responsible for investigating any complaint received regarding animal waste management. *Id.* § 35:45-1-7(c)(1). Furthermore, ODAFF is also responsible for initiating enforcement actions in the event that any poultry operation violates the standards set by the Legislature in the Oklahoma Agricultural Code, *see* OKLA. STAT. tit. 2, § 10-9.7(B), to wit:

[10] Plaintiffs have also alleged that the Defendants have violated Section 10-9.7. However, Peterson maintains that this determination, like those under Sections 2-6-105 and 2-18.1, are to be made by the administrative body to whom the Oklahoma Legislature has delegated the duty, *i.e.*, in this case, ODAFF.

> These [enforcement] actions integrate corrective or remedial activities that can include clean up activities and restoration activities. Remediation requirements are determined on a case-by-case basis. The Department shall assess and review all approved remediation requirements to provide technical standards for future remediations.

Id. § 35:45-1-7(a)(3). As such, these various determinations outlined in the Oklahoma Statutes and the applicable regulations must be made by ODAFF, as delegated by the Oklahoma Legislature. *Id.*

In addition to this general authority, ODAFF's discretionary authority extends to specific claims made in this action by Plaintiffs. Of particular note, in this action, Plaintiffs allege that Peterson has violated OKLA. STAT. tit. 2, § 2-18.1. Section 2-18.1 states, in pertinent part, as follows:

> A. It shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act.
>
> B. If the *State Board of Agriculture finds that any of the air, land, or waters of the state* which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act *have been or are being polluted*, the *Board shall make an order* requiring that the pollution cease within a time period determined by the Department . . . . In addition, the *Board may assess an administrative penalty* pursuant to Section 2-18 of Title 2of the Oklahoma Statutes. . . .

OKLA. STAT. tit. 2, § 2-18.1 (emphasis added). Notably, the plain language of Section 2-18.1 grants ODAFF the authority to administer the Oklahoma Environmental Code within areas covered by the agency's jurisdiction.

In addition, Plaintiffs have alleged that Peterson has violated OKLA. STAT. tit. 27A, § 2-6-105, which states, in pertinent part, as follows:

> A. It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to

> cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.
>
> B. If the *Executive Director* [of ODEQ] *finds that any of the air, land or waters of the state have been, or are being, polluted, the Executive Director shall make an order requiring such pollution to cease* within a reasonable time, or requiring such manner of treatment or of disposition of the sewage or other pollution materials as may in his judgment be necessary to prevent further pollution. . . .

OKLA. STAT. tit. 27A, § 2-6-105 (emphasis added).

Comparing the structure of Section 2-18.1 with Section 2-6-105, it is evident that these statutory provisions have parallel construction, which necessitates the conclusion that the legislative intent of these statutes is the same. *See City of Hugo v. State ex rel. Public Employees Relations Bd.*, 886 P.2d 485, 493 (Okla. 1994) (interpreting legislative intent based on parallel provisions). Under either statutory provision, subparagraph A must be read in conjunction with subparagraph B. *See id.* at 8 n.5; *cf. Cox v. State ex rel. Okla. Dep't of Human Servs.*, 87 P.3d 607, 614-15 (Okla. 2004) (commenting, "[i]ntent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each").

Notably, this Court has previously interpreted Section 2-6-105 to require a factual finding by the Executive Director of the ODEQ under subparagraph B of Section 2-6-105 before liability may attach under subparagraph A of the statute. *See Burlington N. & Santa Fe R.R. Co. v. Spin-Galv*, No. 03-CV-162-P(J), at 7-8 (N.D. Okla. Oct. 5, 2004) (unpublished), *appeal docketed*, No. 04-5182 (10th Cir. Nov. 26, 2004) (attached hereto as Exhibit "4"). As such, as a matter of simple statutory interpretation, Section 2-18.1 likewise requires an administrative finding under its subparagraph B by ODAFF before liability can potentially attach under subparagraph A. *Cf.* OKLA. STAT. tit. 2, § 2-16 ("*When requested by the State Board of Agriculture* it shall be the duty of the district attorney or Attorney General to institute appropriate proceedings in the proper courts . . ."

(emphasis added)). Under either section, the requisite factual finding is a discretionary duty delegated to ODAFF or another environmental agency by the Oklahoma Legislature. Thus, under the law of Oklahoma, these duties cannot be further delegated to another state agency, another executive officer, or a judicial body. Under the doctrine of primary jurisdiction, these issues should be resolved by the assigned agency, which in this case is ODAFF.

Moreover, if ODAFF is not given the opportunity to make the requisite findings required by the aforementioned statutory and regulatory provisions, Peterson will potentially be subjected to conflicting orders of the agency and this Court. For example, were ODAFF to make the factual determination required by Section 2-18.1 and determine that Peterson has not polluted the waters of the IRW, it could nevertheless be subjected to claims of liability in this Court for pollution of the waters of the IRW.

The potential for inconsistent orders is further exacerbated by Plaintiffs' contention that Peterson has allegedly polluted the IRW through the acts of the independent farmers with whom it contracts. As a matter of law, these farmers are required to obtain an Animal Waste Management Plan ("AWMP") which must include a host of requirements for the handling and land application of poultry litter, including nutrient analysis for the litter, descriptions of the land where it will be applied, application rates, and other related information. *See* OKLA. STAT. tit. 2, § 10-9.7 (C) (containing list of requirements that must be contained in the AWMP); *see* OAC § 35:17-5-5 (describing information required in the AWMPs); *see also* OAC § 35:17-3-14 (containing additional requirements for AWMPs). Thus, while the independent farmers obtain and comply the requirements of their AWMPs, if Plaintiffs have their way, Peterson could nonetheless be subjected to claims of liability in this Court for this *lawful* conduct.

Similarly, with regard to inconsistent orders, Plaintiffs seek as a remedy in this action the termination or modification of the litter utilization practices employed by the farmers in the IRW, while at the same time, these land application practices are specifically prescribed by regulations promulgated by ODAFF in the Oklahoma portion of the IRW, and the Arkansas Natural Resources Commission on its side of the state line. Thus, if Plaintiffs are allowed to simply ignore this substantial body of law, Defendants and the independent contract farmers who grow poultry will be subjected to an uncertain and ambiguous regulatory environment where they can potentially be found liable for conduct authorized by the Oklahoma and Arkansas Legislatures. *But cf.* OKLA. STAT. tit. 50, § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance").

A dramatic illustration of the necessity for allowing the regulatory agencies to perform their delegated function arises from Plaintiffs' claims based upon CERCLA, 42 U.S.C. § 9601 *et seq.*, and SWDA, 42 U.S.C. § 6901 *et seq.* (Complaint Counts 1, 2 and 3.) A finding of liability under these federal acts will require the Court to find that poultry litter is a "hazardous substance" under CERCLA, and a "solid" or "hazardous waste" under SWDA. 42 U.S.C. §§ 6972 and 9607. Such findings would be entirely inconsistent with the animal waste management scheme set forth in the laws and regulations of both Arkansas and Oklahoma (and for that matter, the federal regulations for Confined Animal Feeding Operations), and would have the practical effect of nullifying both states' agricultural nonpoint source management programs. Accordingly, if ODAFF is not permitted to carry out its legislatively delegated duties, Plaintiffs, through the Attorney General, will be permitted to effectively undermine or effectively invalidate these statutory and regulatory

provisions, thereby creating an intolerable predicament for Defendants and the thousands of farmers who must discern which standard must apply.

Furthermore, this Court cannot fashion the type of relief requested by Plaintiffs on their Oklahoma statutory and regulatory claims. In this regard, Plaintiffs seek administrative penalties for each of these statutory and regulatory claims. (Complaint at ¶¶ 132, 136, 139). However, by operation of law, the authority to assess such civil penalties has been delegated to ODAFF, who may seek to assess the penalties in either an administrative proceeding or in a court. *See* OKLA. STAT. tit. 2, § 2-18. In this regard, Section 2-18 limits the assessment of administrative penalty to ODAFF after "notice and opportunity for a hearing." *Id.* § 2-18(A), (D). Under this statutory scheme, Plaintiffs, through the Attorney General, is *only* authorized to enforce an administrative penalty assessed by ODAFF in the manner provided by statute for the enforcement of a civil judgment. *See id.* §§ 2-7(B), 2-16(B). Nothing in these statutes permits or otherwise authorizes Plaintiffs, through the Attorney General or otherwise, to seek assessment of such a penalty *sua sponte*.

As discussed in *Marshall*, a dispute involving public rights warrants turning the matter over to the agency responsible for resolving the issues addressed in the dispute. In addition to the other factors addressed above, this factor, too, further compels the position that this action be stayed until such time as ODAFF performs the duties delegated to it by the Oklahoma Legislature. Likewise, as discussed in greater detail in the following section, if Plaintiffs are permitted to continue this litigation against Peterson and the other Defendants, notwithstanding the Legislature's delegation of authority elsewhere, the lawsuit would surely disrupt Oklahoma's efforts to establish a "coherent policy with respect to a matter of substantial public concern." *Marshall*, 874 F.2d at 1379. At minimum, the lawsuit would render the Oklahoma Agricultural Code, the related regulations, and

much of the Oklahoma Environmental Code mere surplusage, having little or no practical application to the issues for which the Legislature sought to remedy. As such, this action should be stayed until such time as the various agencies perform their legislatively delegated duties.

3. *The Clean Water Act also dictates that the Court should defer to the primary jurisdiction of the regulatory agencies*.

As noted above, Plaintiffs' attempt to regulate through litigation undermines, and effectively supercedes, the efforts by the Oklahoma Legislature and environmental agencies to formulate and implement a coherent water policy as required by the Clean Water Act.[11] *See*, *e.g.*, 33 U.S.C. § 1313(d)(1)(C) (requiring development of total maximum daily loads for "impaired" waterways listed on a state's 303(d) list). These CWA requirements further compel the conclusion that this action should be stayed until the various environmental regulatory agencies have complied with their delegated duties in order to avoid "the disruption of state efforts to establish a coherent policy with respect to a matter of substantial concern." *Marshall*, 874 F.2d at 1379. Indeed, ODAFF's efforts at regulating agriculturally related nonpoint source pollution fall within this broader scheme mandated by Congress.[12]

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[11] In addition to the Clean Water Act, the ARBC requires "[t]he cooperation of the appropriate state agencies in the State of Arkansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas River Basin." OKLA. STAT. tit. 82, § 1421, art. VII(B). Thus, under the doctrine of primary jurisdiction, the agencies designated by the States under the ARBC must likewise be permitted to fulfill these congressionally delegated duties before Plaintiffs are permitted to pursue the instant litigation against Peterson.

[12] As the Oklahoma Attorney General has recognized, ODAFF plays a key role in this ongoing process to meet the WQS by determining Best Management Practices and adjusting the standards for Animal Waste Management Plans to minimize the "contamination of waters of the state." 1997 OK AG 95, ¶ 11.

In this regard, the CWA mandates that Oklahoma adopt a comprehensive and coherent policy with regard to its waters. As part of a larger water quality management program, Section 303 of the CWA requires Oklahoma to adopt water quality standards ("WQS") for its *intrastate* waters and submit the WQSs to the EPA for its approval. 33 U.S.C. § 1313(a)(3)(A).[13] The WQSs "are the State's goals for individual water bodies and provide the legal basis for control decisions under the [Clean Water] Act." 40 C.F.R. § 130.0(b). The Oklahoma Water Resources Board ("OWRB") is charged with developing, and has developed, Oklahoma's WQSs. *See* OKLA. STAT. tit. 82, § 1085.30; OKLA. ADMIN. CODE §§ 35:45-1-4(a) and 785:45-1-1.[14] After WQSs have been adopted, the State is required to publicly review them at least once every three (3) years and may be required to submit them to the EPA for further review. 33 U.S.C. § 1313(c)(1)-(4); *see* 40 C.F.R. Pt. 131 (containing the procedures for developing, reviewing, and revising the WQSs).

Oklahoma is required to, and does, continuously monitor the navigable waters within its borders and to report their condition in conjunction with the approved WQSs. *See* 33 U.S.C. § 1315(b)(1); 40 C.F.R. § 130.0(b). To further this objective, Oklahoma must also establish monitoring methods and procedures to compile data needed to analyze water quality. 40 C.F.R. § 130.4(a). The federal regulations state that the monitoring data will be used in "determining

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[13] "A water quality standard (WQS) defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary protect the uses." 40 C.F.R. § 130.3. These WQSs "serve the dual purposes of establishing the water quality goals for a specific water body and serving as the regulatory basis for establishment of water quality-based treatment controls and strategies beyond the technology-based level of treatment required by . . . the [Clean Water] Act." *Id.*

[14] Each of the State of Oklahoma's "environmental agencies" is responsible for utilizing and enforcing the WQSs. *See* OKLA. STAT. tit. 27A, § 1-1-202(a)(2). These environmental agencies are the OWRB, the Oklahoma Corporation Commission, ODAFF, the Oklahoma Conservation Commission, the Oklahoma Department of Wildlife Conservation, the Oklahoma Department of Mines, and the ODEQ. *See id.* § 1-1-102(13).

abatement and control priorities; developing and reviewing water quality standards, total maximum daily loads, wasteload allocations and load allocations; assessing compliance with National Pollutant Discharge Elimination System ("NPDES") permits by dischargers; reporting information to the public through the section 305(b) report and reviewing site-specific monitoring efforts." *Id.* § 130.4(b).

In addition to the development of WQSs, Section 303 of the CWA requires Oklahoma to identify "those waters within [its] boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). Oklahoma is required to identify those waters which will not meet the established WQSs and to list them on its "303(d) list". *See* 40 C.F.R. § 130.7(b)(1). Oklahoma is then required to provide documentation to the EPA for each of its listed water bodies, justifying its place on the list. *Id.* § 1307.(b)(6). Significantly, for purposes of this action, Oklahoma has listed waters within the IRW on its 303(d) list, including Tenkiller Ferry Lake, the Illinois River, Flint Creek, and Baron Fork, among others. *See* OKLA. DEP'T ENV. QUALITY, WATER QUALITY ASSESSMENT INTEGRATED REPORT: PREPARED PURSUANT TO SECTION 303(D) AND SECTION 305(B) OF THE CLEAN WATER ACT, app. C, at 8-9 (2004) (attached hereto as Exhibit "5").

For each of the waters identified, including those within the IRW, Oklahoma is required to establish a Total Maximum Daily Load ("TMDL") for the applicable pollutants. 33 U.S.C. § 1313(d)(1)(C).[15] The EPA regulations describe the purpose and goal of the TMDLs as follows:

[15] "TMDLs are a device to assure attainment of water quality goals by calculating the amount of allowable pollutants that may be discharged into a water body and allocating these loads among pollutant sources." Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 652 (2004).

"TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQLS [water quality limited segments] with seasonal variations and a margin of safety which takes into account the relationship between effluent limitations and water quality." 40 C.F.R. § 130.7(c)(1); *see* OAC § 35:45-1-2 (stating a TMDL is "a written, pollutant-specific and water body-specific plan establishing pollutant loads for point and nonpoint sources, incorporating safety reserves, to ensure that a specific water body will attain and maintain the water quality necessary to support existing and designated beneficial uses"); *see also* Cynthia D. Norgart, *Florida's Impaired Waters Rule: Is There a "Method" to the Madness?*, 19 J. LAND USE & ENVTL. L. 347, 348 (2004) (noting that the TMDL establishes the maximum level of pollutants that an impaired water body can take without exceeding the established WQS for the water body).

In Oklahoma, the Oklahoma Department of Environmental Quality ("ODEQ") is charged with establishing, implementing, and enforcing the TMDLs. OKLA. STAT. tit. 27A, § 2-6-103(A)(6). The ODEQ regulations state that it "will establish TMDLs for impaired water bodies, including wasteload allocations for point sources and load allocations for nonpoint sources, in accordance with the procedures described in the [Continuing Planning Process]." OAC § 252:690-1-7. The ODEQ has also been given the discretionary authority to coordinate with the other environmental agencies in preparing the TMDLs. *See id.*; OKLA. STAT. tit. 27A, § 2-6-103(A)(8).

The general process described in Oklahoma's most recent Continuing Planning Process document for developing a TMDL for an impaired water body is as follows:

> The first step in developing a TMDL involves establishing a goal, or target, which is usually related to achieving a particular numerical or narrative water quality criterion. Because of the complexity of the WQS, this goal may be specific to a particular pollutant or may involve a number of pollutants. In addition, this goal may be set differently depending on the type of water body. Multiple targets are appropriate in cases where different requirements must be applied to different points

> in the water body or where differing requirements are associated with multiple uses. A phased approach can be appropriate in some cases.

OKLA. DEP'T ENV. QUALITY, CONTINUING PLANNING PROCESS 156 (2002) [hereinafter "2002 CPP"] (attached hereto as Exhibit "6"). Oklahoma is required to have the CPP document under the auspices of the CWA. 33 U.S.C. § 1313(e). The document is Oklahoma's plan for the waters within its borders and must contain detailed plans for, among other things, procedures for establishing TMDLs for waters listed on Oklahoma's 303(d) list. *Id.* § 1313(e)(3)(C). The 2002 CPP, as it must, further describes the steps in developing a TMDL: (1) assessing existing conditions of the water body; (2) identifying and analyzing all pollutant sources; and (3) allocating loadings among pollutant sources. 2002 CPP at 157-58.

This extensive and comprehensive process culminates with the TMDL loading allocation which distributes "pollutant loads among various point, nonpoint, natural background sources, and margin of safety." *Id*. at 160. The TMDL promulgation process is designed to be an exhaustive and comprehensive approach to remedying purportedly impaired water bodies contained on the 303(d) list, bringing them within the established WQSs. In other words, the TMDL process focuses on all sources of purported pollution within a 303(d) listed water body in an concerted effort to bring it with the established WQSs. Notably, ODEQ scheduled the completion of TMDLs for waters within the IRW (including Tenkiller Ferry Lake, the Illinois River, Flint Creek, and Baron Fork) for 2004 and has begun work on these. *See* OKLA. CONSERVATION COMM'N, WATERSHED RESTORATION ACTION STRATEGY FOR THE ILLINOIS RIVER/BARON FORK WATERSHED 5 (1999) (noting that ODEQ has begun TMDLs "to protect the Illinois River and Lake Tenkiller"). Thus, the doctrine of primary jurisdiction requires that this process be completed before this litigation is permitted to move forward.

In any event, this Court should not grant the relief requested by Plaintiffs absent the factual determinations required under Oklahoma and federal law by ODAFF, OWRB, ODEQ, and the other Oklahoma environmental agencies to the extent that they have jurisdiction over the issues raised in Plaintiffs' Complaint. Any other result permits Plaintiffs to ignore, undermine, or sidestep the public policy present in the Oklahoma and federal statutes and regulations and to further disrupt the continuing, comprehensive efforts of the various Oklahoma environmental agencies to formulate and implement a coherent policy with regard to the water quality within the IRW. To avoid this result, this action should, if not dismissed, be stayed until such time as the designated agencies fulfill the duties and responsibilities mandated by Oklahoma and federal law.

III. CONCLUSION

Plaintiffs' allegations in their Complaint are insufficient to establish that they have stated a claim in each of the ten counts against Peterson for which this Court can grant relief, even when those allegations are viewed with a favorable bias toward Plaintiffs. First, Plaintiffs have failed to state an actionable claim in this lawsuit to the extent is seeks to impose liability on Peterson for the alleged acts of omissions of the Arkansas farmers with whom it contracts to raise poultry within the borders of Arkansas. The various claims in the Complaint are precluded because the claims encroach upon Arkansas's sovereignty, violate constitutional principles or are otherwise preempted by federal law, including but not necessarily limited to the Clean Water Act and the Arkansas River Basin Compact. Second, because land application of poultry litter has a recognized beneficial use, Plaintiffs cannot maintain a nuisance *per se* claim under the circumstances of this lawsuit. Third, Plaintiffs have not complied with the applicable notice requirements prior to commencing their SWDA claim and are not proper parties for such an action. Fourth, the Court lacks subject matter

jurisdiction over the claims in this lawsuit because Plaintiffs have failed to exhaust the administrative remedies required under Oklahoma law and because the common-law claims are precluded under the Political Question Doctrine. All of these reasons compel the conclusion that this action must be dismissed in accordance with Federal Rules of Civil Procedure 12(b)(1) and (6).

In the alternative, or in addition to partial dismissal, this action should be stayed until such time as ODAFF makes the various determinations delegated to it by the Oklahoma Legislature as the administrative agency with jurisdiction over alleged agricultural nonpoint pollution in Oklahoma. This lawsuit is within the jurisdiction of ODAFF, and it is the only entity authorized by the Oklahoma Legislature to determine whether the acts and omissions in Oklahoma alleged in the Complaint have caused the pollution alleged therein. Furthermore, the TMDL promulgation scheme mandated by the Clean Water Act compels the conclusion that the subject matter of this lawsuit must first be addressed by the Oklahoma environmental agencies responsible for implementation of this process before Plaintiffs can seek to hold Peterson liable for the alleged acts and omissions contained in the Complaint. This conclusion is based on the doctrine of primary jurisdiction and analogous Oklahoma law which prohibits another entity, whether the Attorney General of Oklahoma, this Court, or a jury, from performing legislatively delegated duties.

Respectfully submitted,

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